



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aquasis Services, Inc.

File: B-229723

Date: February 16, 1988

DIGEST

A damages provision in a solicitation for telephone switchboard operations which permits the government to deduct from the contractor's payment an amount representing the value of the required service item does not impose an unreasonable measure of damages where the task, answering a call in a timely manner and helping to complete the call, is not divisible by separate elements or tasks for purposes of determining an acceptable quality level because such criteria in this instance are interrelated and reasonably meet the particular needs of the agency.

DECISION

Aquasis Services Inc. protests allegedly defective specifications in invitation for bids (IFB) No. F08621-87-B-0126, issued by the United States Air Force for services necessary to operate the administrative telephone switchboard operation at Homestead Air Force Base, Florida. Specifically, Aquasis alleges that the solicitation provisions under the heading "Performance Requirements Summary" (PRS) permit deductions in the contractor's payment which are in excess of the value of tasks actually performed deficiently and, thus, constitute a unenforceable penalty. The bid opening date has been suspended indefinitely pending resolution of this protest.

We deny the protest.

The IFB incorporated by reference the standard "Warranty of Services" clause contained in the Federal Acquisition Regulation (FAR) § 52.246-20. It reserves the government's right to inspect all services, to the extent practicable, at all times during the term of the contract. The clause also provides that, when defects cannot be corrected by reperformance, the government may reduce the contract price to

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reflect the reduced value of the services performed. The IFB also contains a "Contractor Payment" section 4.1 which states:

"For performance of a service that does not exceed the AQL [acceptable quality level] the contractor shall be paid the percentage of the monthly contract line item price indicated in Column 5 of the attached PRS charts for that service."

The PRS provisions permit the Air Force to sample the contractor's performance of some services by random sampling and customer complaints and to deduct payments for unsatisfactory services in an amount calculated to represent the value the unsatisfactory service bears to all the contract's requirements. To determine that value, the PRS breaks the total contract effort down to its basic component services. The value of unsatisfactory performance under a component service is determined by calculating the percentage any sampled unsatisfactory service bears to the size of the entire sample, and then multiplying it times a fixed percentage listed in the IFB which represents the value of the component service in comparison with the total contract effort. The IFB also provides an allowable deviation for which the government will not take any deductions.

Aquasis alleges that the solicitation improperly groups several tasks in RS-1 (Required Service) into a single deduction category which effectively allows the Air Force the right to deduct for the entire item should the contractor fail to perform one of the tasks since no provision is made for partial performance or pro rata deductions. Specifically the required service at issue is to "provide operator assistance for all incoming and outgoing calls." The individual tasks included in the RS-1 Component to be sampled are (1) answer call within four rings and (2) complete call or provide dialing procedures if connection cannot be made. The maximum payment percentage for meeting the acceptable quality level is 65 percent in RS-1. If the contractor, in RS-1, failed to answer the call on the fourth ring but instead answered on the fifth and performed the other individual task, that is, completed the call or provided further customer information, the contractor would not receive any compensation for any of the tasks performed. Therefore, Aquasis asserts that the solicitation's deduction system can result in deductions unrelated to the value of the task deficiently performed.

Liquidated damages are fixed amounts which the government can recover from the contractor upon proof of violation of the contract and without proof of the damages actually

sustained. Environmental Aseptic Services Administration, B-221316, Mar. 18, 1986, 86-1 CPD ¶ 268; Environmental Aseptic Services Administration, 64 Comp. Gen. 54 (1984), 84-2 CPD ¶ 510. A rate for liquidated damages must be reasonable in light of the solicitation's requirements since liquidated damages fixed without reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. FAR § 12.202(b) (FAC 84-2). We will review a protest alleging that a solicitation's liquidated damages provision imposes a penalty because any solicitation providing penalties for inadequate performance, in addition to violating applicable procurement regulations, can adversely affect competition and unnecessarily raise the government's costs. Environmental Aseptic Services Administration and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 CPD ¶ 194.

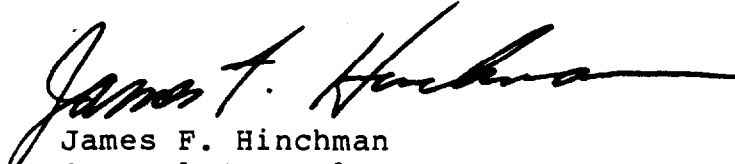
Before we will rule that a liquidated damages provision imposes a penalty, however, the protester must show there is no possible relation between the amounts stipulated for liquidated damages and losses which are contemplated by the parties. See Wheeler Brothers, Inc., B-223263.2, Nov. 18, 1986, 86-2 CPD ¶ 575. A protester who objects to a solicitation's deduction provision has a heavy burden. Sunrise Maintenance Systems, B-219763.2, Nov. 26, 1985, 85-2 CPD ¶ 603. It is the contracting agency that is most familiar with the conditions under which the services and supplies have been and will be used. Therefore, our Office will not question agency decisions concerning the best methods of accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Id.

Aquasis has not met its burden of showing the deduction of 65 percent for deficient performance in RS-1 is unreasonable. The agency report indicates, and we agree, that answering a call and completing the call or providing dialing procedures are essentially one task. The value of performing only a portion of the task has a significant impact on the complete task and thereby diminishes the overall value of the task. For example, a call untimely answered is not corrected by the completing of the call or satisfactorily providing further dialing procedures because this reflects adversely on the efficiency of the agency. The requirement for timely answering of the calls obviously indicates that the ability to respond quickly is of critical concern to the agency. Similarly, a call answered by the fourth ring but then misdirected is of negligible value to the Air Force. Thus, it is essential that all the criteria for answering and completing of a call be met by the

contractor at Homestead since the agency reasonably concludes that partial performance will have little or no value to the agency. The Air Force thus has emphasized the importance of RS-1 and has designated its acceptable quality level accordingly.

While Aquasis disagrees with the percentage deduction assigned, we have no evidence in the record to indicate that the emphasis on RS-1 is an abuse of agency discretion. We note that the Air Force issued an amendment to an identical solicitation for telephone switchboard operations at Maxwell Air Force Base which allowed credit for partial performance in answering calls. On the other hand, the contracting officer reports that the 65 percent deduction is used throughout the Air Force Tactical Air Command without problems except at two bases at which contracts are held by Aquasis. We have no explanation regarding why Maxwell Air Force Base decided to allow credit for partial performance, but, based on the above, we cannot conclude that the deduction system as proposed in this Air Force solicitation is unreasonable. See Environmental Aseptic Services Administration--Request for Reconsideration, B-218487.3, Jan. 2, 1986, 86-1 CPD ¶ 1. However, by letter of today, to the Secretary of the Air Force, we recommend that the Air Force determine whether or not the 65 percent deduction contained in Homestead Air Force Base's IFB accurately reflects the activity's actual minimum needs in light of the action taken at Maxwell Air Force Base.

The protest is denied.


James F. Hinchman
General Counsel